



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

APR 19 2016

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Individual Waiver Pursuant to 18 U.S.C. § 208(b)(1)

FROM: Kevin S. Minoli *KSQ*
Designated Agency Ethics Official and
Principal Deputy General Counsel

TO: Ebonye-Rosa Allen
Interim Director
Gulf of Mexico Program Office

I am writing with regard to your request for an individual waiver pursuant to 18 U.S.C. § 208(b)(1) to allow for a modification to your existing assignment under the Intergovernmental Personnel Act (IPA), 5 U.S.C. § 3371, *et seq.* Under your previous IPA scope of work, you served as the Interim Director of the United States Environmental Protection Agency's Gulf of Mexico Program Office (EPA/GMPO). In this position, you represented EPA in all matters related to program development and implementation of the Gulf of Mexico Program, including general supervision of the staff and ensuring that environmental goals of the program were addressed. Now that the permanent director has completed his rotational assignment in Headquarters, he is returning to serve as the Director and you have been asked to serve as the Acting Deputy Director of the GMPO. Your IPA assignment will be modified accordingly.

Federal laws regarding conflicts of interest are critical to ensuring public confidence in the integrity of Agency decision making and are not swayed by personal interests. You seek an individual waiver to allow you to work on particular matters that affect the State of Mississippi during your IPA assignment to the position of Acting Deputy Director. After careful consideration of the facts, I am granting you this limited waiver of the requirements of 18 U.S.C. § 208(b)(1). Your appointing official, the Regional Administrator, has no objection to this waiver.

Below I describe my application of federal law and guidance from the Office of Government Ethics to the specific facts of your request.

Mississippi and EPA's Gulf of Mexico Program Office

The entity with which you have a conflict of interest under 18 U.S.C. § 208(b)(1) is your employer of record, Mississippi, which is one of the jurisdictions affected by EPA's GMPO. This scope of GMPO involves the entire Gulf of Mexico ecosystem, including protection and

restoration of all marine, coastal and estuarine resources associated with the five Gulf Coast States. Through the GMPO, EPA provides leadership and coordination in the planning and implementation of, among other things, a major federal, state, local and private regional resource management effort resulting from the 2010 Deepwater Horizon rig explosion and resultant oil spill. This catastrophic spill resulted in billions of dollars in environmental harm.

Your Role As It Relates to Mississippi

Prior to your IPA assignment with EPA, you were the Gulf Coast Restoration Coordinator for the Mississippi Department of Environmental Quality (MDEQ) and served as the interim director of the Gulf Coast Ecosystem Restoration Council, a consortium of State and federal officials. In both of these positions, your responsibilities included coordinating the restoration, recovery and response activities resulting from the Deepwater Horizon oil spill. You necessarily interacted with EPA and other federal officials.

To serve as the Interim Director of GMPO, you sought and received an individual waiver on August 7, 2015, that permitted you to work closely with the Gulf States, including Mississippi, to represent EPA in all matters related to program development and implementation, and to serve as the principal spokesperson for the Agency's Gulf of Mexico Program. You oversaw and monitored Agency programs as they relate to activities designed to abate pollution to the Gulf of Mexico, including overseeing staffing and management of the GMPO, general supervision of the staff to support office programs and initiatives, ensuring the delivery of expert assistance on multi-media issues to EPA offices, and ensuring that the environmental commitments of the GMPO were fulfilled. In the position of Acting Deputy Director, you will continue to serve in a leadership role under the supervision of the Director. Under the terms of the modified IPA's scope of work, you anticipate that you will continue to be involved in a broad range of program and policy development issues as well as staffing and management issues. You will still not, however, actually make any recommendations or decisions regarding grants to your employer of record.

The Financial Interest at Issue

During your IPA detail, EPA will reimburse Mississippi 100% of your salary (currently \$ [b] [6] annually) and benefits. EPA will also pay for operational travel expenses, provide equipment, and pay for lodging and travel. You will not be counted against the EPA employee ceiling.

Individuals detailed to EPA under an IPA are considered to be employees of their home institution "for all purposes except work and supervision," *see* EPA's IPA Policy and Procedures Manual, p. 1-3, but are also subject to the federal ethics statutes, including 18 U.S.C. § 208, which governs financial conflicts of interest. Pursuant to 18 U.S.C. § 208(a), executive branch employees are prohibited from participating personally and substantially in a particular matter that will have a direct and predictable effect on their financial interest or those interests that are imputed to them. You have an imputed financial interest in Mississippi because of your

employment relationship and because you are now vested in the Mississippi State Employee Retirement System. Your continued employment, compensation and defined contribution plan with Mississippi are personal financial interests.

Your Efforts to Obtain and Abide By Ethics Counselling

Prior to beginning your IPA, you obtained advice from the Office of General Counsel/Ethics and took the online IPA training course. You did not begin that IPA assignment and your duties as Interim Director you received the individual waiver, and have been advised not to proceed with assuming new duties under the modified IPA until the issuance of this waiver.

The Legal Standard

As an individual serving in an IPA assignment, you are deemed an "employee" for the purposes of the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the federal conflict of interest statutes codified at Title 18 of the United States Code. See 5 C.F.R. § 2635.102(h) [defining "employee" as including "employees of a State or local government ... serving on detail to an agency, pursuant to 5 U.S.C. § 3371, *et seq.*"]. You are prohibited from participating personally and substantially in an official capacity in particular matters in which you have a personal financial interest or in which you have an imputed interest under 18 U.S.C. § 208. The fact that you are detailed from a State does not render this prohibition inapplicable. The statute is intended to prevent employees from allowing personal or imputed financial interests to affect their official actions and to protect government processes from any actual or apparent conflict of interest.

Specifically, the statute states:

Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, ... participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

For the purposes of this provision, the financial interests of Mississippi are imputed to you because you are their employee of record, and your continued employment with Mississippi

is a personal financial interest. Absent a waiver from your personal and imputed financial interest, you cannot participate in any particular matter that affects Mississippi's financial interests.

18 U.S.C. § 208 provides for the possibility of obtaining a waiver of the requirements of the provision:

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

You seek a waiver under this provision.

Your Request for a Waiver to Serve as the Acting Deputy Director of GMPO

You seek a waiver from the financial conflict of interest statute for the duration of your modified IPA assignment. This waiver, which is subject to the terms and limitations discussed below, will permit you to perform the responsibilities EPA and Mississippi authorize you to perform as Acting Deputy Director under the terms of the IPA modification.

Application of Applicable Law to Your Request for a Waiver and Decision

As EPA's Designated Agency Ethics Official, I am authorized to waive the criminal prohibition upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you, the employee. Before I render a decision I must first, pursuant to 5 C.F.R. § 2640.303, consult with the Office of Government Ethics, where practicable, which I have done.

As stated at the outset of this letter, federal conflict of interest laws are critical to ensuring federal employees have the interests of the United States – and not their personal interests – in mind when performing their responsibilities as a federal employee. If federal law identifies a set of facts as presenting a conflict of interest for a federal employee, that is a very serious matter and the employee and agency ethics officials should move swiftly to bring the conduct of the employee into compliance with federal law.

In this situation, I conclude that your employment status and your compensation and defined contribution plan with Mississippi are personal or imputed financial interests with Mississippi of the sort prohibited by 18 U.S.C. § 208. Absent a waiver or applicable regulatory exemption, you cannot participate. The statute's prohibitions are not absolute, however, and

specifically authorize an agency official to waive those prohibitions in certain limited circumstances. At EPA, I am the Designated Agency Ethics Official and, as such, have the authority to grant such a waiver. As stated above, I am required, if possible, to consult with the Office of Government Ethics before rendering my decision.

Having applied the applicable law and Office of Government Ethics guidance to the facts of this case, I have concluded that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you from now for the duration of your IPA term, and therefore grant you a waiver from the prohibitions contained in 18 U.S.C. § 208 during that time period.

Legal Analysis

As articulated in the statute itself and in guidance from the Office of Government Ethics, the key determination for a deciding official is whether the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from the employee. In applying the factors articulated by the Office of Government Ethics at 5 C.F.R. § 2640.301(b), I find that:

- You and Mississippi are the “persons” whose financial interests are involved;
- You will serve on a modified IPA assignment from Mississippi, with EPA reimbursing Mississippi for your salary and benefits;
- The disqualifying financial interest arises from your employment status with Mississippi, which raises the potential for gain or loss for the State as a result of government action that you may participate in as part of your EPA duties;
- Your employment status with Mississippi and the fact that you are now vested in the state retirement system are of substantial financial interest to you;
- Your position as Acting Deputy Director of the Gulf of Mexico Program Office will involve your personal and substantial participation in particular matters that involve Mississippi specifically, but will not involve decisions or recommendations about grants to Mississippi; and
- Both EPA and Mississippi contemplate assigning you to work on environmental issues that involve or impact that State.

I have considered these factors carefully. I find that your imputed interest in Mississippi is a financial conflict of interest for you, and that you have a personal financial interest in your continued employment and compensation package. Under the statute, therefore, the only remaining question is whether the interest “is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee.” In considering this aspect of the statutory test, the fact that you are on an IPA is particularly relevant.

By signing the IPA agreement and the modification, EPA and Mississippi both assigned you to work on environmental issues that may involve the State. The “integrity of the services”

that Mississippi and EPA expect from you is to fulfill the IPA duties as described in the latest versions of the agreement and position description to the best of your ability to benefit both organizations. There is no limit on the performance of these duties even if they are not fully aligned with the interests of Mississippi on a particular matter.

In passing the IPA, Congress clearly intended for an exchange of personnel and expertise between federal government and other entities, including states. To refuse to consider a waiver at all, or to dramatically limit one, would seem to defeat that intention. I therefore conclude that your imputed and personal financial interests in Mississippi are not likely to affect the integrity of the services that the United States Government and EPA expect from you, so I am granting this limited waiver.

Conclusion

Based on the factual circumstances of this request, including the expectations of Mississippi and EPA that you are performing work to benefit both organizations, the limited nature of the request, and the fact that you will be under the direct supervision of the GMPO Director, I hereby grant the request for a waiver under 18 U.S.C. § 208(b)(1). Your activities as Acting Deputy Director are unlikely to affect your continued employment, compensation or defined contribution plan with the State. This waiver is limited in nature and permits only your official participation in particular matters that arise in the Gulf of Mexico Program Office that you will be participating in as part of your assigned duties as the Acting Deputy Director. Your duties are not expected to include making any recommendations or decisions about awarding grants to Mississippi, but you are reminded that you are prohibited from doing so. This waiver will automatically become void and cease to be effective upon termination of your IPA assignment.

You understand that you remain a federal employee while on the IPA assignment, subject to the Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. Part 2635, and the criminal conflict of interest statutes, 18 U.S.C. §§ 203, 205, 207, 208, and 209, as well as other applicable laws. If you have questions about whether a certain matter is covered by this waiver, or whether an action you may take while on detail implicates the ethics laws, you are directed to promptly seek assistance from Justina Fugh, Senior Counsel for Ethics, or me.

Finally, pursuant to 5 C.F.R. § 2640.304, a copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304 and 5 U.S.C. § 552.

cc: Javoyne Hicks-White, Chief of Staff
Ben Scaggs, Director, GMPO
Nancy Tommelleo, Deputy Regional Counsel